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Federal Communications Commission

WASHINGTON, D. C.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Implementation of the)	
Cable Television Consumer)	
Protection and Competition)	PP Docket No. 93-21
Act of 1992)	
)	
Inquiry into Sports)	
Programming Migration)	

COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

Time Warner Entertainment Company, L.P. ("Time Warner") respectfully submits its reply comments in the above-captioned proceeding.¹ Time Warner reiterates its view that the increase in the amount of sports programming on cable is not a result of "migration" from broadcast television. Instead, that increase is due to a myriad of causes; including the greater quantity of sports programming being sold and an unwillingness on the part of broadcasters to purchase all available sports programming.

INTRODUCTION

In its initial Comments, Time Warner urged the Commission to make its study of sports programming migration broad-based and comprehensive by analyzing the economics of the relevant sports and differentiating between sports programming "migration" and abandonment of certain sports programming by broadcasters. Only

¹ Notice of Inquiry in PP Docket No. 93-21, FCC 93-77 (rel. February 9, 1993) ("Notice").

by examining when and why rights-holders have turned to cable as an outlet for their programming will the Commission's study present a fair and complete analysis of sports programming.

The record in this Inquiry underscores the need for the Commission to so structure the study. The comments of the rights-holders, cable programmers and the broadcast networks not only provide data on the respective amounts of sports on broadcast television and cable (both of which have grown since 1980), they also address the reasons behind, and nature of, the growth in cable sports programming over the past decade. There is a remarkable degree of consensus among these disparate parties that such growth is not a function of "migration" of sports programming to cable.

I. The Record Demonstrates that Cable Sports Programming has Supplemented Rather than Supplanted Broadcast Sports Programming

The comments filed in the Inquiry by cable programmers uniformly supported Time Warner's position that cable sports programming has supplemented broadcast sports programming to the benefit of viewers. It has done this in three ways. First, as commenters such as ESPN pointed out,² cable has provided a viewing outlet for many sports that never found a home on broadcast television. Second, cable has put back on television sports that broadcasters abandoned as uneconomical. For example, as Capital Cities/ABC, Inc. noted, "[B]oxing . . . has a more

² Comments of ESPN, Inc. at 3.

specialized audience than the sports listed in the Notice, and does not have as extensive a history on broadcast television. Even before cable service became widely available, major boxing bouts largely appeared on closed-circuit television rather than broadcast television."³

The third way in which cable sports programming has benefitted viewers by supplementing broadcast sports coverage is by televising major sports games that the broadcasters lack either the time slots or financial incentives to carry. Every rights-holder filing comments made this very essential point. For instance, the college athletic conferences all said something similar to The Southland Conference's statement that:

Because broadcast television stations and networks have not expressed interest in televising the Conference games carried on HSE and ESPN, or any of the numerous other Conference football and men's and women's Conference basketball games, there has been no 'migration' of Conference sports events to cable. Rather, there has been an expansion of sports programming through cable carriage.⁴

³ Comments of Capital Cities/ABC Inc. at footnote 4. See also, Comments of National Cable Television Association, Inc. at 5.

⁴ Comments of The Southland Conference at 2-3. See also, Comments of the Atlantic Coast Conference at 3-4; Joint Comments of The Big East Conference and The Big East Football Conference at 6-7; Comments of The Colonial Athletic Association at 2-3; Comments of The Colorado Athletic Conference at 2-3; Comments of Colorado State University at 2-3; Comments of Pacific 10 Conference at 1-2; Comments of Southwest Conference at 4-5; Comments of the Texas Special Olympics at 2-3; Comments of the University Interscholastic League at 2-3; and Comments of the University of Denver at 2-3.

The professional sport leagues likewise agreed that cable sports programming supplements broadcast coverage and expands viewer options. The National Football League stated:

[C]able television has been a supplement to an expansive broadcast package and has had the effect of increasing the number of games available to fans and therefore expanding output. . . . And there is no reason to believe that broadcasters have a substantial interest in purchasing the rights to additional games now being televised on basic cable.⁵

The Office of the Commissioner of Baseball stated:

Cable and other subscription services . . . have supplemented, rather than supplanted, broadcast coverage of Baseball; they have televised games that otherwise would not have been available for telecast.⁶

And the National Basketball Association noted:

Since 1981 . . . the number of telecasts of NBA games on broadcast television, both locally and nationally, has grown significantly. Simultaneously, the number of telecasts on over-the-air television has been supplemented, not supplanted, by an increase in telecasts on non-broadcast media, fueled in large part by the growth of cable regional sports networks.⁷

The rights-holders and cable programmers are not the only ones contending that migration has not occurred. Capital

⁵ Comments of The National Football League at 5-6 (emphasis in original).

⁶ Comments of the Office of the Commissioner of Baseball at (ii).

⁷ Comments of the National Basketball Association at 1-2 (emphasis in original).

Cities/ABC shares the view that there has not been "[s]ignificant migration of sports programming to cable or subscription services."⁸ Instead, it notes, the sports events shown on cable

and some free over-the-air channels have in addition been shown in

II. In Conducting the Analysis of Preclusive Contracts Mandated by Section 26(c)(1) of Cable Act, the Commission Should Not Measure Output Solely in Terms of Number of Games

Section 26(c)(1) of the Cable Television Consumer Protection and Competition Act of 1992¹¹ mandates that the Commission analyze preclusive contracts between college athletic conferences and video programming vendors. The letter attached to the Notice from Richard L. Rosen of the U.S. Department of Justice states that the legality of such contracts under the antitrust laws requires a balancing of potential procompetitive and anticompetitive effects of such contracts to "[a]ssess whether such agreements have the effect of limiting the televising of sporting events or whether they serve to increase the aggregate number of sporting events shown on television."¹² Time Warner believes that Rosen's letter states too limited a measure of output. Rather than measuring solely the number of games on television, the Commission's analysis of preclusive contracts should focus on total output, including the amount of money paid to rights-holders for such contracts. Only by measuring the premium paid for preclusive contracts and assessing the beneficial impact of such premiums on rights-holders can the Commission determine the propriety of such contracts. Time

¹¹ Pub. L. No. 102-385, 106 Stat. 1460 (1992) (hereinafter, the "Act" or "Cable Act").

¹² Letter from Richard L. Rosen, Chief, Communications and Finance Section, Antitrust Division, U.S. Department of Justice, to Renee Licht, Acting General Counsel, Federal Communications Commission at 1 (December 21, 1992).

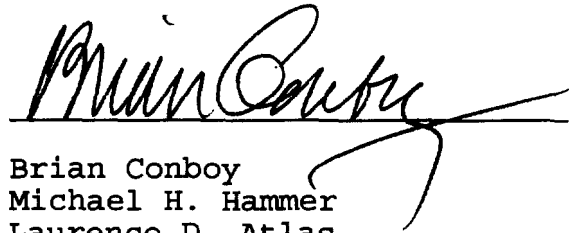
Warner believes that even under the narrower definition of output suggested by Rosen's letter, the procompetitive effects of preclusive contracts outweigh their anticompetitive effects and therefore such contracts are not violative of the antitrust laws.

III. Conclusion

Time Warner respectfully submits that the Commission satisfy its obligation under Section 26 of the Cable Act consistent with Time Warner's initial comments and the reply comments contained herein.

Respectfully submitted,

TIME WARNER ENTERTAINMENT
COMPANY, L.P.

A handwritten signature in black ink, appearing to read "Brian Conboy", is written over a horizontal line. The signature is fluid and cursive.

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